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Supreme Court, U.S.
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No. 04-1145

IN THE

# Supreme Court of the United States

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LEROY "BUD" BENSEL, JAMES ARTHUR, PATRICK BRADY, THEODORE A. CASE, MATTHEW J. COMLISH, DARSHANPRIT DHILLON, LEMUEL A. DOUGHERTY, MICHAEL V. FINUCAN, JOHN S. HEFLEY, HOWARD B. HOLLANDER, ROBERT A. PASTORE and SALLY YOUNG, individually and as members of a class consisting of former Trans World Airlines, Inc., pilots employed by TWA Airlines, LLC as of April 2001,

*Petitioners,*

v.

ALLIED PILOTS ASSOCIATION, TWA AIRLINES, LLC, AIR LINE PILOTS ASSOCIATION and AMERICAN AIRLINES, INC.,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF IN OPPOSITION FOR RESPONDENT ALLIED PILOTS ASSOCIATION

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## QUESTIONS PRESENTED

The questions presented by the instant Petition are as follows:

1. Whether the requested writ should be granted when the claim petitioners present is untimely and there is no confusion among or conflict between the Courts of Appeals concerning the chief legal issue asserted.

2. Whether the exclusive collective bargaining representative of the employees in a particular collective bargaining unit may retroactively be held to owe a duty of fair representation to persons in another collective bargaining unit with their own exclusive collective bargaining representative certified by the National Mediation Board, which representative they are actively pursuing for alleged breaches of the duty.

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## BRIEF IN OPPOSITION FOR RESPONDENT ALLIED PILOTS ASSOCIATION

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## BRIEF IN OPPOSITION

Respondent Allied Pilots Association ("APA") respectfully submits that the Petition should be denied. The essence of petitioners' claim is that they were somehow entitled to exclusive representation by two labor unions at the same time, even though one of those unions, the APA, was indisputably the exclusive representative of an entirely different bargaining unit of employees, a unit with differing interests in how seniority integration with petitioners' bargaining unit should be handled. Petitioners' novel theory of extra-unit

representation need never be reached in the first place in this case, however, because their claim against the APA is time-barred. The theory itself is based on an extension of this Court's holding in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952), that finds no support in this Court's decisions following *Howard* and no support in post-*Howard* decisions of the Courts of Appeals. The theory would also undermine the exclusive jurisdiction of the National Mediation Board ("NMB") to determine the representative of a given collective bargaining unit and therefore conflict with *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). Finally, significant public policy concerns argue persuasively against the adoption of any such theory.

## COUNTER-STATEMENT OF CASE

Petitioners are members of a class of airline pilots formerly employed by Trans World Airlines, Inc. ("TWA"), who, as a result of a purchase in bankruptcy of TWA assets by American Airlines, Inc. ("AA"), became employees of an AA subsidiary, TWA LLC, in April 2001. At all relevant times both before April 2001 and continuing until April 3, 2002, the class members' exclusive collective bargaining representative was the Air Line Pilots Association ("ALPA"). At all relevant times, the incumbent AA pilots' exclusive collective bargaining representative was the APA. Only on April 3, 2002, did the NMB certify the APA to represent both pilot groups.

The class initially brought this suit against ALPA and APA on September 3, 2002, and subsequently expanded the action to include claims against AA and TWA LLC. The gravamen of the complaint was that, although the classmembers maintained their relative seniority status as between themselves when the AA and TWA LLC pilot bargaining units were combined on April 3, 2002, they did not receive the seniority status they desired in relation to the incumbent AA

pilots. The seniority structure applicable to the combined pilot unit as of April 3, 2002, had been established in Supplement CC to the AA/APA collective bargaining agreement, which had been executed by APA and AA on November 8, 2001.

Among the ten federal and state law claims in its Complaint, the class charged ALPA, as its exclusive bargaining representative, with breaching its duty of fair representation to them prior to April 3, 2002, *inter alia*, by allegedly failing to challenge Supplement CC once it was executed on November 8, 2001; failing to negotiate more attractive seniority placements for the classmembers with either AA or TWA LCC; failing to challenge APA's certification by the NMB as the representative of the combined pilot unit on April 3, 2002; and failing itself to seek to represent the combined pilot unit. Petition at A-11, 12.

The class also brought a two part claim for breach of the duty of fair representation against the APA. One facet of the claim charged that, although ALPA exclusively represented the incumbent AA pilots prior to April 3, 2002, the APA somehow also owed a duty of fair representation to the classmembers prior to that date and breached that duty by entering into Supplement CC in November 2001. The second facet of the claim charged the APA with breaching the duty after it was certified to represent the class on April 3, 2002, by not renegotiating Supplement CC to provide a more attractive seniority arrangement for the classmembers.

Although the District Court dismissed the breach of duty claim against ALPA on limitations grounds, the Third Circuit reversed and remanded the claim, and the class is currently pursuing the claim against ALPA in the District Court. The District Court granted summary judgment in the APA's favor and dismissed the two part breach of duty claim against it on the grounds that (1) APA owed no such duty to the class prior to its certification to represent the classmembers on April 3,

2002, because the classmembers were not members of the bargaining unit the APA was certified to represent prior to that date; and (2) the APA committed no actionable breach after certification. The Third Circuit affirmed on both issues. The District Court dismissed all claims against AA and TWA LLC and also dismissed all state law claims against all parties as preempted by federal law. The Third Circuit affirmed all of these judgments.

In their Petition, petitioners bring no challenge to the decisions below with respect to ALPA, AA or TWA LLC and no challenge to the decisions with respect to the state law claims against any party. Neither do they challenge the dismissal of their claim that APA breached the duty of fair representation to them after it had been certified as their bargaining representative. The only challenge raised here is to the decisions below that the APA did not have—and therefore could not be deemed to have breached—a duty of fair representation to the classmembers prior to its certification as the representative of the combined AA/TWA LLC pilot bargaining unit on April 3, 2002.

## COUNTER-STATEMENT OF FACTS

After surviving a number of bankruptcies, by the Spring of 2000, TWA determined that it could no longer continue as an independent airline; it therefore commenced discussions with AA over the possibility of AA's purchasing TWA's assets and providing continuing employment to TWA's employees. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 286 (3d Cir. 2003). AA agreed to an asset purchase plan in the context of a bankruptcy filing by TWA. *Id.* The Bankruptcy Court determined that AA's offer was not only the highest and best offer for the assets but also the only proposal that would preserve the jobs of TWA's 20,000 employees. *Id.* at 287, 293. If the sale did not go forward, the Court concluded, TWA would most likely be liquidated. *Id.*

In order to ensure that AA would, in fact, complete the purchase and hire the TWA pilots, petitioners, through their certified, exclusive bargaining representative ALPA, agreed to delete certain labor protective provisions from the pre-existing ALPA/TWA collective bargaining agreement. Petition at 5-6. Those protective provisions would have enabled petitioners, through ALPA, to force arbitration of seniority integration issues if they were dissatisfied with the seniority placement offered them at AA. *Id.* The collective bargaining agreement negotiated between ALPA and TWA LLC to cover petitioners' terms and conditions of employment while at TWA LLC, the TWA LLC/ALPA Transition Agreement, carried forward the seniority system operative at TWA to apply at TWA LLC for a temporary period. A1031-32. Upon the integration of the TWA LLC and AA pilot bargaining units, the TWA LLC/ALPA Transition Agreement, and the TWA LLC seniority system contained within it, were to "terminate in all respects." A1040. The Transition Agreement made no mention of the seniority the former TWA pilots might have once they became employed in a combined pilot unit at AA. A0550.

At all times prior to the TWA transaction, AA's collective bargaining agreement with the APA provided for a pilot seniority system. As pertinent here, Section 13 of the AA/APA agreement provided that pilots first coming to AA, whether as new hires or through an acquisition, only received and began to accrue seniority as of the dates the pilots actually began to perform pilot duties at AA. A0058, 0292-94. At all relevant times, petitioners were aware of Section 13 and its terms; at all relevant times, they were also aware that the bulk of the incumbent American pilots, whom the APA had a duty to represent, opposed the integration of seniority lists in a manner other than that provided by Section 13. A0054, 0058.

As part of the agreement to waive the labor protective provisions of the TWA/ALPA collective bargaining agreement, ALPA won a promise from AA to use its "best efforts" to secure a "fair and equitable" process for determining seniority integration. Petition at 5. Consistent with that agreement and although not compelled to do so, the APA agreed in a written Facilitation Agreement to enter into negotiations with ALPA over seniority integration to be mediated by a "facilitator" retained by AA, thus delivering to the TWA LLC pilots the agreed upon benefits of their waiver bargain. A0319-23.[1] Those negotiations began in February 2001 and ultimately extended into October 2001. A0325. At all times before, during and after these negotiations and until April 3, 2002, the APA made clear to the TWA LLC pilots that it represented the incumbent AA pilots and not the TWA LLC pilots. A0073.

Although the ALPA and APA negotiators reached common ground on significant methodological issues, they were not able to reach final agreement on the terms of an integrated seniority list. *Id.*; A0059. Rather than simply revert to a straightforward application of the pre-existing Section 13 of the AA/APA collective bargaining agreement (*i.e.*, a simple "end-tailing" of the TWA LLC pilots), however, the APA used the methodologies developed in its negotiations with ALPA in negotiating a modification of Section 13 with AA. The modified agreement "dovetailed" large numbers of TWA LLC pilots with the incumbent AA pilots and also included conditions and restrictions that protected the jobs, captain and first officer positions and promotional opportunities for the TWA LLC pilots at the sole remaining TWA LLC pilot base in St. Louis. A0058-60, 0324-40. The modification, known as Supplement CC, was executed by the APA and AA on

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[1] ALPA ultimately filed a grievance alleging that AA breached its "best efforts" commitment, but an arbitrator decided otherwise. A0453-61. Neither ALPA nor the class ever challenged that arbitration decision.

November 8, 2001. A0059-60. Supplement CC made no changes whatsoever in the relative seniority position of any TWA LLC pilot vis-a-vis any other TWA LLC pilot. Petition at A0032.

When on November 9, 2001, APA petitioned the NMB to declare that AA and TWA LLC constituted a single employer for representational purposes, both ALPA and its TWA LLC unit, the TWA LLC Master Executive Council (including several class representatives here), opposed the petition, contending that AA and TWA LLC did *not* constitute a single employer. A0060, 0517, 0540. The NMB decided otherwise on March 5, 2002, finding that the two carriers constituted a single employer. *Am. Airlines, Inc.*, 29 NMB 201 (2002). In that decision, the NMB gave ALPA thirty days to present a sufficient showing of interest in representing the combined pilot unit. *Id.* The NMB also directed that during the thirty day period, ALPA would continue to serve as the exclusive bargaining representative of the TWA LLC pilots, and the APA would continue to serve as the exclusive representative of the incumbent AA pilots. *Id.* When ALPA formally disclaimed interest in representing the combined pilot group, on April 3, 2002, the NMB extended the APA's certification to represent all pilots in the combined unit and extinguished ALPA's certification. *Am. Airlines, Inc.*, 29 NMB 260 (2002). According to their express terms, on that date the ALPA/TWA LLC Transition Agreement terminated "in all respects," and Supplement CC and the rest of the AA/APA collective bargaining agreement became applicable to the TWA LLC pilots. A1040.

## REASONS FOR DENYING WRIT

**I.** The central act petitioners seek to reach through the retroactive imposition of a duty of fair representation on the APA prior to its certification as their representative is the negotiation and execution of Supplement CC. Indeed, Sup-

plement CC established the seniority integration system of which petitioners complain, and petitioners identify no other pre-certification act by the APA that arguably injured them. It is not necessary to resolve petitioners' theory in this case, however, because any claim that APA breached a duty to petitioners prior to certification is untimely.[2] For this reason alone, the instant petition should be denied. *Busby v. Elec. Utils. Employees Union*, 323 U.S. 72, 75 (1944).

It is well established that when a party claims injury as a result of a labor union's entry into a collective bargaining agreement, the limitations period for a breach of duty claim against the union runs from the date of the execution of the agreement. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 415-17 (1960). The fact that the allegedly injurious terms of the agreement are not implemented until a later date neither tolls the limitations period nor gives rise to a separate cause of action upon implementation. *Id.* at 422-23 ("[T]he vice in the enforcement of this agreement is manifestly not independent of the legality of its execution."); *see also Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979) ("The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.")). This rule governs in cases involving a seniority system; the limitations period for complaints about the operation of the system begins to run when the system is adopted, not when it is applied. *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 909 (1989).

The statute of limitations for a breach of duty of fair representation claim is six months. *DelCostello v. IBT*, 462

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[2] The APA raised the timeliness issue in each of the courts below. However, because both courts held that the APA had no pre-certification duty to petitioners, they did not reach the issue.

U.S. 151, 171-72 (1983). Although Supplement CC was executed on November 8, 2001, the class did not file suit against the APA until September 3, 2002—almost ten full months after their pre-certification breach of duty claim arose. *See* Petition at 3 n.2.[3] Thus, the claim petitioners raise for this Court's consideration is untimely, and resolution of their novel representational duty theory would not be necessary.

**II.** Petitioners concede that they were not members of the particular bargaining unit for which the APA was the exclusive bargaining representative during the time period during which they seek to impose the duty of fair representation on the APA. There can be no dispute that the judicially imposed duty of fair representation derives directly from and depends on a labor union's role as the exclusive representative of a particular bargaining unit of employees. *See, e.g., Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998) ("When a labor organization has been selected as the exclusive representative of the employees in a bargaining unit, it has a duty, implied from its status . . . as the exclusive representative of the employees in the unit, to represent all members fairly."); *Schneider Moving & Storage v. Robbins*, 466 U.S. 364, 376 n.22 (1984) ("A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for

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[3] Even if the petitioners' claim could be held to relate back to the date the APA filed its own complaint in the instant action (June 19, 2002), the result would remain the same because June 19, 2002, is over seven months after their pre-certification breach of duty claim arose. *See* Petition at 3 n.2. No relation back to February 2002, when the APA filed a similar suit in Texas, is possible because that suit was dismissed not on the merits but on personal jurisdiction grounds, *id.*; thus that filing could not toll the running of the limitations period. *Nelson v. Local 854 Dock Loaders*, 993 F.2d 496, 498-99 (5th Cir. 1993); *Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988).

all the employees within the unit."); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). And only the NMB has jurisdiction under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188, to determine the exclusive representative of a bargaining unit. *Switchmen's Union*, 320 U.S. at 303.

Faced with this obdurate legal reality, petitioners reach for a theory that might extend the duty beyond the confines of the collective bargaining unit the APA was certified to represent even though that theory would compromise the APA's ability to fulfill its duty to the pilots it was actually certified to represent—the incumbent AA pilots. They also reach for a theory that would impose on the APA a duty to them during the same time period that ALPA unquestionably owed them precisely the same duty, and for ALPA's alleged breach of which petitioners are currently pursuing ALPA in the District Court.

Petitioners' theory is subdivided into three contentions: first, that their expanded view of this Court's holding in *Howard* somehow survived the limitations placed on that holding by *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), and still survives in the Courts of Appeals; second, that the Court somehow "revitalized" petitioners' expanded view of *Howard*, albeit *sub silentio*, in *Breininger v. Sheet Metal Workers International Ass'n Local Union No. 6*, 493 U.S. 67 (1989), a decision concerning the operation of a union hiring hall under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*; and third, that their expanded view of *Howard* somehow lives on in a series of cases holding that an uncertified union may voluntarily assume the duty if it holds itself out as the representative of a given group of workers and the workers rely on that union as their representative.

As demonstrated below, none of these contentions can withstand scrutiny, particularly in the context of the instant case.

**A.** To the extent that petitioners would read *Howard* to impose a generalized duty of fair representation on labor unions to employees outside of the bargaining units the unions "exclusively" represent, *Howard* would indeed be anomalous. That, of course, is not the applicable law as set forth in *Vaca*, this Court's seminal statement on the duty's reach, and as subsequently reiterated in *Schneider Moving & Storage* and, most recently, *Marquez*. Moreover, that is not even how the *Howard* Court couched its own holding. On the contrary, as the *Howard* Court put the matter, "The Federal Act [the RLA] thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." 343 U.S. at 774. In short, *Howard* barred unions certified under the RLA from racially motivated depredations against other employees. The dissent in *Howard* also recognized the limited scope of the majority opinion: "The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to fair representation by the Brotherhood, but because they are Negroes who were discriminated against by the carrier at the behest of the Brotherhood." *Id.* at 777-78 (Minton, J. dissenting).[4]

When this Court broached the question of *Howard*'s reach in *Allied Chemical*, it underscored the same limited ambit evident in *Howard* itself:

> In *Howard* we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The

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[4] The *Howard* majority recognized that the black employees at issue, while designated "porters," actually performed all of the functions of the white "brakemen" who sought to eliminate their jobs. 343 U.S. at 770-71. Functionally, then, the black "porters" and white "brakemen" were members of the same bargaining unit and would formally have been considered as such but for the racial discrimination at issue in the case. *Id.*

> reach and rationale of *Howard* are a matter of some conjecture. . . . But whatever its theory, the case obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.

404 U.S. at 181 n.20.

Thus, either taken on its own terms or as interpreted by *Allied Chemical*, *Howard* can have no applicability here. No racial discrimination was involved or alleged in this case, and the APA did not force AA to eliminate anyone's job. At worst, Supplement CC gave the TWA LLC pilots less seniority in the combined pilot unit than they desired; but it is well established that those pilots had no pre-existing right to any particular level of seniority at their new employer.[5]

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[5] In the absence of a statutory pronouncement to the contrary—and the RLA has none—seniority rights arise from and are defined by the pertinent union contract. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21 (1947); *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949); *see, e.g., Wightman v. Springfield Terminal Ry.*, 100 F.3d 228, 232 (1st Cir. 1996) (in the absence of a contract, seniority rights do not exist). As creatures of contract, moreover, seniority rights do not "vest." *Wightman*, 100 F.3d at 232; *McMullans v. Kan., Okla. & Gulf Ry.*, 229 F.2d 50, 53 (10th Cir. 1956); *Local 1251 UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968). Instead, seniority rights are subject to revision or even termination with the termination or renegotiation of the pertinent collective bargaining agreement on which those rights depend. *Wightman*, 100 F.3d at 232; *Dempsey v. Atchison, Topeka & Santa Fe Ry.*, 16 F.3d 832, 839 (7th Cir. 1994); *Robertshaw Controls Co.*, 405 F.2d at 33; *McMullans*, 229 F.2d at 53. Thus, in a merger or acquisition situation, outside of seniority rights an employee may gain pursuant to the bargaining agreement in effect at his or her new employer, an employee "acquired" as the result of a merger or similar corporate transaction has no statutorily protected right to seniority. *NLRB v. Whiting Milk Corp.*, 342 F.2d 8, 10 (1st Cir. 1965). Accordingly, once the TWA LLC/ALPA Transition Agreement terminated, the only seniority "right" any TWA LLC pilot had at AA was as defined by the AA/APA agreement and its Supplement CC.

Notwithstanding petitioners' contentions to the contrary, there simply is no "tension" or confusion among the Courts of Appeals as to the reach of *Howard* after *Allied Chemical*. Absent extraordinary circumstances not present in this case, *see infra* at 18-19, the Courts of Appeals, including the Third Circuit in this case, have uniformly held that a union like the APA owes no duty to persons like petitioners who are not part of the bargaining unit the union is certified to represent, even if such persons have previously been or might in the future become members of that unit. *See, e.g., Allen v. CSX Transp., Inc.*, 325 F.3d 768, 772-74 (6th Cir. 2003); *Spenlau v. CSX Transp., Inc.*, 279 F.3d 1313, 1315-16 (11th Cir. 2002); *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002); *Merk v. Jewel Cos.*, 848 F.2d 761, 766 (7th Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 181 (8th Cir. 1984); *Cooper v. Gen. Motors Corp.*, 651 F.2d 249, 250 (5th Cir. 1981); *see also Riser Foods*, 309 NLRB 635, 636 (1992).[6]

The notion that the Third Circuit has taken a mixed approach to the matter, Petition at 14-15, is demonstrably incorrect. For instance, the Third Circuit did not hold that employment "applicants" were to be treated as members of a bargaining unit for duty of fair representation purposes in *Peterson v. Lehigh Valley District Council*, 676 F.2d 81, 87

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[6] *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974), cited in Petition at 16, is not to the contrary. In *Jones* a union was found to have breached the duty of fair representation to a group of non-union passenger relations agents who were disadvantaged when the union entered into a new agreement with the employer that favored union members over those who were not union members. The *Jones* Court, however, expressly found that the agents, although not members of the union, were in fact "members of the collective bargaining unit" to which the union owed a duty. *Jones*, 495 F.2d at 798. Thus, while *Jones* certainly does stand for the proposition that a union owes a duty to all members of the pertinent bargaining *unit*—regardless of whether they are members of the *union*—it does not hold that a union owes a duty to people outside the *unit*.

(3d Cir. 1982). Rather, the Court specifically found that, at the time the alleged breaches of duty in the case took place, the employees at issue had already been "hired" and were actually working in the bargaining unit. *Id.* And while the district court in *Felice v. Sever*, 985 F.2d 1221 (3d Cir. 1993), may have made comments suggesting that the duty of fair representation could theoretically extend to persons outside of the bargaining unit, the Circuit itself engaged in no such speculation and squarely held that the duty did not run to someone, who, while a union member, did not work in the pertinent bargaining unit represented by the union at issue. *Id.* at 1228-29.

*Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), can hardly be read to create a tension with *Allied Chemical* itself or with either *Peterson*, *Felice* or the Third Circuit's decision in this case. In *Nedd*, a group of retirees sued their union for breach of duty when, in its role as the authority responsible for appointing the majority of the trustees for a jointly administered pension trust fund, the union unilaterally took on the task of collecting delinquent employer contributions to the fund and failed at that task, thereby decreasing the assets available to pay pensions. 556 F.2d at 195. The *Nedd* court distinguished *Allied Chemical* on the ground that when the union unilaterally undertook a duty to non-members of the bargaining unit that it was not obligated to undertake, the union "was not then entitled to act in a manner which discriminated against the pensioners." 556 F.2d at 200.

Thus, far from standing for the notion that a union has an indwelling legal duty to people who are not members of a bargaining unit the union is certified to represent, *Nedd*, like the "holding out" cases discussed *infra* at 18-19, only stands for the proposition that when a union voluntarily elects to

reach beyond its legal obligations on behalf of a group, it must carry out its voluntarily assumed duties "fairly."[7]

Petitioners' effort to find some *Howard*-related tension in the Sixth Circuit is similarly spurious. *See* Petition at 16. As even petitioners concede, *McTighe v. Mechanics Educational Society of America, Local 19*, 772 F.2d 210 (6th Cir. 1985), stands firmly for the proposition that a union owes no duty to one who, although he may in the past have been part of the unit, at the time of the events in question, was no longer part of the bargaining unit (having left to become a supervisor). Contrary to petitioners' contention, *Woosley v. Avco Corp.*, 944 F.2d 313 (6th Cir. 1991), in no way reverses course on the matter. Indeed, no union was party to the case, and the duty of fair representation was in no way implicated. Instead, *Woosley* only held that the provisions of the particular bargaining agreement at issue gave a former unit member serving as a supervisor a firm right to return to his unit. *Id.* at 317.

In short, there is simply no confusion among the Courts of Appeals as to the meaning of *Howard* in the wake of *Allied Chemical* and therefore no need for this Court to resolve or "clarify" the limits of a union's duty in general or the APA's duty in this case.

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[7] *Nedd* has no applicability here because the APA never volunteered to represent the petitioners in negotiating Supplement CC. On the contrary, the APA negotiated that modification to the AA/APA collective bargaining agreement only on behalf of the incumbent AA pilots the APA had a duty to represent. To the extent that Supplement CC introduced terms into the AA/APA bargaining agreement that would be applicable to people who might subsequently become AA employees, Supplement CC is no different from any term of a collective bargaining agreement that becomes applicable to workers who enter the bargaining unit subsequent to the negotiation of the agreement. As the Seventh Circuit pointed out in *ALPA v. United Air Lines, Inc.*, 802 F.2d 886, 917 (7th Cir. 1986), under the RLA, "A union is required to bargain over the terms and conditions of employment that will be in place when future employees take their positions."

**B.** Although *Breininger* does not even mention *Howard*, petitioners would find in it emanations of *Howard* on the assumed premise that *Breininger* and other NLRA hiring hall cases stand for the proposition that a union has a duty to represent people, chiefly hiring hall registrants, who are not members of a given bargaining unit. That premise, however, is simply wrong.

The premise is wrong, first, because a union authorized to operate a hiring hall under the NLRA is authorized to do so only in its role as the certified representative of the employees in a particular bargaining unit established under a collective bargaining agreement. As *Breininger* itself defined the situation,

> Only because of its status as a [National Labor Relations] Board-certified bargaining representative and by virtue of the power granted to it by the collective-bargaining agreement does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion, because *the members of the bargaining unit* have entrusted the union with the task of representing them.

493 U.S. at 87-88 (emphasis added); *see also Jacoby v. NLRB*, 325 F.3d 301, 305 (D.C. Cir. 2003) (in operating a hiring hall, a union is "acting under the authority of these statutes as the exclusive agent for employees in designated collective bargaining units").

Second, petitioners are wrong because under the NLRA, registrants at hiring halls—including those "who have never been hired in the first place"—are nonetheless deemed to be "employees" and therefore included in the bargaining unit the union operating the hiring hall represents. *Allied Chemical*, 404 U.S. at 168; *Local 872, ILA*, 163 NLRB 586 (1967). Thus, when *Breininger* and other NLRA hiring hall cases speak in terms of a union's duty to hiring hall registrants,

they are speaking about a duty owed only to bargaining unit members.

The source of petitioners' confusion on this issue is apparent. While the NLRA deems hiring hall registrants to be "employees" and therefore members of a given bargaining unit, under the RLA, which governs in this case (and which makes no provision for the operation of a hiring hall in the first place), job applicants are not "employees" or members of a bargaining unit. On the contrary, under the RLA, one becomes an "employee" only when one actually enters "the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service)." 45 U.S.C. § 151 Fifth; *see also* 45 U.S.C. § 181 (similarly defining an airline "employee"). Because petitioners mistakenly attempt to view the hiring hall cases through an RLA lens, they mistakenly conclude that an NLRA hiring hall union's duty extends to people who, under the RLA, would not qualify as members of a bargaining unit. That attempt to mix and match the two very different statutes leads nowhere, however, because the RLA simply does not afford job applicants the status ("employee" and bargaining unit member) necessary to qualify for union representation or for the application of the duty of fair representation. *See United Air Lines*, 802 F.2d at 911-14; *Eastern Air Lines v. ALPA*, 920 F.2d 722, 727 (11th Cir. 1990).

The hiring hall cases do not even have any significance here as an analogy because the strict duties imposed on hiring hall operators are imposed in recognition of the fact that in operating a hiring hall, unions exercise an employer-like function—*i.e.*, the ability to grant or deny employment. *Breininger*, 493 U.S. at 88-89. That level of authority simply does not exist in the RLA context or in this case, where the APA neither sought to play nor did play any role in hiring employees for AA or in denying employment to anyone. All the APA did was to negotiate a seniority system with AA, as

it had every right and duty to do. *United Air Lines*, 802 F.2d at 917.[8] And the seniority system devised by Supplement CC created a far more advantageous situation for TWA LLC pilots than they would have had under the pre-existing Section 13 of the AA/APA collective bargaining agreement.[9]

**C.** As the last leg of their theoretical tripod, petitioners advert to a series of cases in which, similar to *Nedd*, a union, although not certified to represent a particular group of workers, voluntarily holds itself out as their representative and therefore takes on a duty to represent them fairly. Petition at 19-21. At the outset it merits mention that in none of the cases cited did the workers at issue actually have their own, pre-existing certified representative with a pre-existing duty to represent them. That distinction is critical because each of the "holding out" cases requires that the workers at issue actually rely on the representations of the "holding out" union. *Mui v. Union of Needletraders*, 213 F.3d 626, No. 99-9147, 2000 WL 669670, at *4 (2d Cir. May 23, 2000); *BIW Deceived v. Local S6 Indus. Union of Marine & Shipbuilding Workers*, 132 F.3d 824, 833 (1st Cir. 1997); *Chavez v. UFCW*, 779 F.2d 1353, 1356 (8th Cir. 1985); *Quarles v. Remington Arms Co.*, 848 F. Supp. 328, 331 (D. Conn. 1994).[10]

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[8] Indeed, had the APA put the interests of the TWA LLC pilots ahead of those of the incumbent AA pilots and "not sought to preserve the seniority of its bargaining unit members to the detriment of those outside the bargaining unit, it would have been remiss in its statutory duty" to the incumbent AA pilots. *McNamara-Blad*, 275 F.3d at 1173.

[9] Granted, before the APA modified Section 13 in Supplement CC, Section 13 would have required the endtailing of all TWA LLC pilots in the combined unit. Because Supplement CC eliminated that aspect of the pre-existing AA/APA agreement and provided any number of special protections for the TWA LLC pilots, *see supra* at 6-7, the endtailing cases cited by petitioners, Petition at 21-22, are inapposite here.

[10] *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 346 (5th Cir. 1980), cited in Petition at 19, is not even a "holding out" case because the Fifth Circuit found that the union at issue had in fact been certified as the unit representative.

In this case, by contrast, during the relevant time period, ALPA was petitioners' certified representative. During that time period, petitioners not only relied on ALPA and ALPA alone to represent them, but they are currently pursuing in the District Court their claim that ALPA breached its duty to them, including, *inter alia*, by failing to challenge Supplement CC. Similarly, their Complaint in this case expressly alleges that the APA repeatedly and publicly announced that it *did not* represent them. *See supra* at 6. Petitioners certainly never believed that the APA was advancing their interests because they well knew that the large majority of APA members favored the application of an unmodified Section 13 to determine petitioners' seniority in the combined unit. *See supra* at 5. Thus, the "holding out" cases can have no applicability here because the critical ingredients in such cases—"holding out" and reliance—are absent.[11]

**III.** Although petitioners offer several policy reasons for expanding duty of fair representation law to benefit them, they cannot escape the fundamental fact that prior to April 3, 2002, the APA was the exclusive bargaining representative of the incumbent AA pilots and as such had a duty to represent those pilots "exclusively" and to advance their interests. *See, e.g., McNamara-Blad*, 275 F.3d at 1172-73. As late as March 5, 2002, the NMB, the agency with the exclusive authority to designate bargaining representatives in the airline industry, *Switchmen's Union*, 320 U.S. at 303, pointedly reminded all concerned parties that until the NMB determined otherwise, the APA was to continue to represent only the incumbent AA

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[11] Petitioners' reference to cases raising the possibility of a state law duty of fair representation, Petition at 20-21, is of no moment because petitioners have alleged no such duty in this case. On the contrary, although they pled any number of state law claims against the APA, the District Court dismissed all such claims as preempted, the Court of Appeals affirmed, and petitioners have not challenged either decision here.

pilots and ALPA was to continue to represent the petitioners and the other TWA LLC pilots. *See supra* at 7.

The imposition on the APA of a duty to petitioners (and retroactively at that) would not only compromise the APA's ability to fulfill its duty to the pilots it was legally required to represent but would also impermissively invade the NMB's exclusive authority to determine representational relationships in the airline industry. Moreover, to impose precisely the same duty on two separate unions to the same group of employees (*i.e.*, petitioners) during the same time period would create utter confusion among unions as to how, when, or even whether to allocate their representational functions with respect to each other or to the employee groups involved. Such confusion would be particularly acute and potentially paralyzing in a case like this, where the two employee groups involved had differing interests in the way the seniority integration would turn out. Indeed, in this particular case, APA and ALPA negotiated for months over the integration, each operating under a negotiator's basic presumption that they were "two adversarial parties" dealing with each other at "arm's length to further their own economic interests." *A.T. Kearney, Inc. v. IBM*, 73 F.3d 238, 242 (9th Cir. 1995) (citation omitted). Although petitioners feel that they were entitled to two champions at that bargaining table, the imposition of their personal preference would have left the incumbent AA pilots with no champion at all or, at best, a severely conflicted "champion." Neither the RLA, the judicially inferred duty of fair representation, or common sense can tolerate that result.

Finally, while petitioners are correct as to the potential for an increasing number of airline combinations in this country, Petition at 21, they draw the wrong conclusions from that likelihood. Given the uncertain economic situation in the industry, it is reasonable to assume that many of those potential combinations will concern a failing or failed carrier and a

healthy one. If the labor union representing the employees of a healthy carrier knew in advance that it might be required to compromise the interests of the employees it represented because it might one day be burdened with a pre-certification double duty to the employees of the failed carrier, the healthy carrier's union would have every incentive to resist the combination entirely. In such situations, the TWAs of the future would simply be allowed to liquidate, and their employees would lose any chance they might have had for continuing employment. That prospect is hardly in the public interest or in the interest of airline employees.

## CONCLUSION

For the foregoing reasons, the APA respectfully requests that the petition for writ of certiorari be denied.

Respectfully Submitted,

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